No. 2734

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GIDEON M. FREEMAN,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

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PERNAU PUBLISHING COMPANY

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I.

The plaintiff in error does not question the sufficiency of the *indictment,* but does insistently maintain that the *case and crime* charged *in* the indictment was *not proved* upon the trial; in truth, only a disjointed skeleton of the crime charged in the indictment was sketched by the proof on the trial.

For instance, the scheme or artifice to defraud or obtain money by false pretenses, etc., to be effected by means of the postoffice, which the indictment charges; the manner of effecting such scheme or artifice by placing or causing to be placed *advertisements* in certain newspapers of general circulation, etc., or placing or causing to be placed in

letters, booklets or other prints, *advertisements* that Dr. Jordan was a practicing physician specially qualified to treat certain specified private diseases and had cured many persons of the same, with intention to defraud them; to cause certain *five named* persons to communicate and correspond by mail, and then by letters, etc., through the postoffice defraud these persons; to make them believe they had disease when they had not; to furnish treatment and medicines regardless of symptom, disease or cure, and without value, etc., to cure; and that Dr. Freeman had no proper or professional knowledge of their condition, or whether diseased or not, or whether the medicine or treatment was capable of benefiting said persons; and for purpose of executing such fraudulent scheme, placed the letters in the postoffice addressed to these five persons, which letters are set out in the indictment (Tr. 2-31).

The proof in the case, we respectfully submit, wholly fails to fairly establish any of the essential facts and acts charged in the indictment; not only of the commission of any crime at all as a result of the things and matters as to which evidence was produced, but utterly failing to connect Dr. Freeman with the commission of the matters and things offered in evidence by the Government as constituting a criminal use of the postoffice with intent to defraud.

First. The indictment charges the scheme to defraud was to be effected *by advertisements* in newspapers, in letters, etc., setting forth in sub-

stance or effect that Dr. Jordan was qualified to treat the private diseases stated and had cured numerous persons afflicted therewith, and by these means the persons to be defrauded were to be induced to correspond, etc. (Tr. 3-4).

The learned United States attorneys (Brief, 3-4), assert that evidence of advertisements *by* either newspapers, letters, booklets or prints would be sufficient; that there is no lack of testimony that *all* of the methods of advertising were used.

The indictment says:

> "said Dr. Gideon M. Freeman should place or cause to be placed advertisements *in* certain newspapers of general circulation published within the United States, or *in* letters, booklets or other prints, *wherein it should be set forth* in substance, or effect, *that*" etc. (Tr. 3.).

The learned Government attorneys then refer to certain *references* to testimony of Government witnesses, saying they saw advertisements, or to references on the trial that advertisements were in certain exhibits, in an attempt to support their claim that the advertisements charged in the indictment were proved as charged, or equivalent thereto.

Their *first* reference is to Inspector G. A. Leonard (Tr. 617), where it is stated in a letter written by Leonard to which he signed the fictitious name, "John Bammer", that "I have seen your advertisement", and follows this with his statement: "I have seen some of Dr. Jordan's advertisements of *that kind*".

But there is no proof here or by these vague references of the advertisements charged in the indictment; or in fact of any advertisement, that is, of the *contents* of any advertisement.

The *next* reference is to (Tr. 106) the testimony of James W. Waltz, a Government postoffice inspector. That testimony reads: "What *purports* to be an advertisement—a newspaper slip—I got from the San Francisco 'Examiner' at my office" (Tr. 106-107). He then says, "I wrote the letter headed * * * That is a true copy of it, as follows:" Then follows *his* letter in which he says: "Will you please send me your book Philosophy of Marriage, which I see in an advertisement of the San Francisco Examiner you will send free" (Tr. 107).

There is no evidence here of advertisements or contents thereof as charged in the indictment.

The learned Government attorneys say (Brief, p. 4): "these same advertisements constitued a *part* of Government's Exhibit 'C' for identification, and were admitted in evidence as part of Government's Exhibit No. 3". But the only evidence here (Tr. 106) is of that witness who says: "*I wrote* some of the *correspondence* in Government's Exhibit 'C' for identification" (Tr. 106).

Now, turning to page 55 of the transcript the court will find that the witness for the Government, F. D. Crable (Tr. 53) was shown a "*package* of correspondence you show me, purporting to be

letters sent and received through my office" (Tr. 54); this witness identified one letter, and this letter was marked for identification "Exhibit C" (Tr. 55) thus: "(Letter marked for identification Exhibit 'C')".

"Exhibit C" was a "(Package marked United States Exhibit No. 3)" (Tr. 92); it consisted of *letters* and they run through pages 92 to 131, and are *all letters.*

The United States attorney made formal offer of the file "Exhibit C" (Tr. 117); and the postoffice inspector, Edmond Honvery, then testifying, said: "This package purports to be a *file of test* correspondence, conducted by me under the name of Anson Ashford" etc. (Tr. 118).

Therefore, the learned Government attorneys are mistaken in the statements in their brief, pages 3-5, that there was proof made upon the trial of the advertisements, that is, of statements *set forth in advertisements* as charged in the indictment. There is no such proof in the record.

The learned Government attorneys (Brief, p. 4), say that on page 267 of this record that Dr. Freeman testified "that the concern was advertising and that he knew it". This is incorrect—Dr. Freeman was testifying to the *letterheads* of "Jordan's Museum of Anatomy", and not to the advertisements charged in the indictment. Nor is this statement correct of the other references to the transcript, pages 62, 63, 72, 74, 93 and 107, and tran-

script pages 253-254, 259-260; these all refer to a book called the "Philosophy of Marriage", and there is no evidence that this book contained advertisements of the matters and things charged in the indictment.

Second. The charges in the indictment that Dr. Freeman tried to make persons believe they were afflicted with diseases when they were not, and *gave or sent* medicines, of little or no value, for the cure of persons afflicted, and to defraud them, and that Dr. Freeman had *no proper or professional knowledge* of such persons' condition, or whether they were diseased or not or whether or not said purported treatment or medicine was capable of benefiting said persons (Tr. 5).

Dr. Freeman was educated at Lake Forest College, in North Carolina; was a soldier in the Civil War; graduated in medicine in 1873, and practiced over *thirty* years (Tr. 250); and was in *good standing* in every way as a physician and surgeon (Tr. 187-188) all his life.

Third. There was and is no proof in the record of any scheme or artifice *to defraud* any person; and the five persons here named in this indictment were *all fictitious,* as well as the correspondence *initiated* by the Government inspectors as *test* correspondence; and every act charged in the indictment of which there was any proof at all on the trial, that proof made by the Government itself, shows absolutely that the Government postoffice inspectors initiated, solicited and induced through

test correspondence, with intent and purpose that no crime in fact should be or would be committed, every act and thing done and proved by them, but with intent to secure and prosecute this indictment, in the event that the Government inspectors' *test* correspondence should be answered as they requested it should, *through the postoffice.*

Fourth. The entire proof absolutely fails to establish the commission of a violation of Section 215, Criminal Code, through the doing by any person of the various acts and things shown upon the trial of this case.

The principal charge seems to be based upon the request for a sample of *urine,* and the reply as to what it indicated; and the postoffice inspector's testimony that he tried to make the sample *urine* (Tr. 129-130).

Dr. Tait, for the Government, seems to be their foundation for such a claim (Tr. 204-205), and he practically eulogizes "masturbation" (Tr. 206-207).

Dr. McNutt, for the Government, does not hold such conclusions (Tr. 196-200); he says:

> "If a man patient were to send me a bottle of liquid that *looked* like urine, without testing it to find out whether it was or not, *I would assume that it was"* (Tr. 199).

Dr. L. F. Kebler, the Government witness and expert from the Bureau of Chemistry, Washington, D. C., agreed with Dr. McNutt that

> "If I were a physician and prescribing for a patient and the patient sent me what *he* claimed was a sample of his *urine, I would assume* it was *urine* * * *" (Tr. 234).

This same learned witness *for the Government* testified:

> "I have read the various symptoms of these supposed patients here. I have heard all the testimony in the case. I agree with the opinion of Dr. Tait and Dr. McNutt that *sufficient* information is not disclosed here to tell *what* is the matter with these people, *or whether there is anything* the matter" (Tr. 231).

The Government's inspector testified that he received one letter after sending a sample of *urine* telling him the sample was very poor quality, about same as ordinary water, and asking for another sample (Tr. 96, 100), and they sent additional samples (Tr. 96-97).

There is no proof in the record that anything shown by or appearing from the evidence on the trial was fraudulent, or done as the result of any scheme or artifice to defraud any person; and the evidence does not prove or establish that any scheme or artifice to defraud or obtain money or property by false pretences or promises, by means of the postoffice, was ever devised by Dr. Freeman or any one else, or that any attempt or use of the postoffice was ever made to effect or carry out any such scheme to defraud.

II.

The learned Government attorneys assert that the letters set out in the indictment were mailed in response to *"decoy"* letters sent out by the postoffice inspectors, and that fact is no defense (Brief, p. 1).

And they then quote from Grimm v. U. S., 156 U. S. 604; but that case was under Section 3893, R. S., which made *lewd* pictures, etc., and every letter, etc., giving information as to such, *unmailable,* and penalizing any person who knowingly deposited any such for mailing.

Justice Brewer said:

> "so, here, the *gist* of the offense is the *mailing* of a letter giving information" (p. 609).

And, again:

> "The law was actually violated by the defendant; he placed letters in the postoffice which conveyed information as to where obscene matter could be obtained, and he placed them there with a view of giving such information to the person who should actually receive those letters, no matter what his name; and the fact that the person who wrote under these assumed names and received his letters was a government detective in no manner detracts from his guilt" (p. 611).

They quote, also, Goode v. U. S., 159 U. S. 663, a case of embezzlement or *theft* by a letter carrier from the mails of a *decoy* letter containing money, and the Court held that the letter carrier had no more right to appropriate the letter to himself than

he would if it were a genuine letter (p. 671). Their other citations are similar.

In the case at bar, the charge is, *not* of depositing these letters in the mails, etc., but of *using* the mails for the purpose of executing or attempting to execute *a scheme* or artifice *to defraud.*

The learned trial judge thus epitomized the statute under which this charge is made, viz:

> "'Whoever, having devised or intending to devise any scheme or artifice *to defraud,* or for obtaining money or property by means of false or fraudulent pretenses, representations or promises, shall, *for the purpose of executing* such scheme or artifice, or attempting so to do, place, or cause to be placed, any letter, in any postoffice of the United States, to be sent or delivered by the postoffice establishment of the United States, or shall take or receive any such therefrom, shall be' punished as therein provided. To constitute an offense under the section you will observe that *two elements are essential:*
>
> 1. The devising by the defendant of a scheme or artifice *to defraud;* and
>
> 2. The use of the United States mails, as set out in that section, *for the purpose of executing* or attempting to execute such scheme or artifice" (Tr. 275).

There is no comparison between any of the cases cited and the case at bar. Here, the *use* of the mails is not prohibited, but use of the mails *with intent* to defraud or obtain money by false pretenses is prohibited.

In the recent case of Sam Yick v. United States, 240 Fed. 60, decided by this Court, the Government

attorneys cited and quoted the decision of Judge Brewer in the case of Grimm v. U. S., 156 U. S. 604, urging upon *this* Court that there the Government inspectors were but *"decoys"* and had not initiated the crime and then secured the indictment of the defendant therefor.

This Court in deciding the case of Sam Yick v. U. S., 240 Fed. 60, at page 65, said:

> "And while it may be true that the mere aiding of one in the commission of a criminal act by a Government officer or agent does not preclude the conviction of the party committing the crime, yet where the officers of the law have *incited* the party *to commit* the crime charged and *lured* him on to its consummation, the law will *not* authorize a verdict of guilty."

And on page 67 this Court, concluding its opinion, said:

> "In the recent case of Woo Wai v. United States, 223 Fed. 412, 137 C. C. A. 604, we distinctly adjudged that it is against public policy to sustain a conviction for crime where the party or parties are induced to commit it by officers of the Government who thereafter ensnare and apprehend them in such commission. In addition to the authorities there cited in support of that conclusion, see, also, Taylor v. United States, 193 Fed. 968, 113 C. C. A. 543, decided by this Court prior to the decision in Woo Wai v. United States, supra; United States v. Healy (D. C.) 202 Fed. 349; United States v. Jones (C. C.) 80 Fed. 513; United States v. Adams (D. C.) 59 Fed. 674; United States v. Whittier, Fed. Cas. No. 16,688, 28 Fed. Cas. 594."

The Government inspector, Honvery, in the case at bar, testified:

> "Upon the *initiative* of the chief inspector this investigation was *begun* * * * by me * * *. *The first act done* * * * *by me* is this * * * letter (Tr. 118). * * * *In response* to that, *the first letter received* from Dr. Jordan *came* * * * (Tr. 119). *Then I filled out* the symptom blank and sent it for mailing" (Tr. 119).

We submit that the Government inspectors themselves all testify that *they initiated* the correspondence in this case, and *in response* to their initiation the acts charged are by them asserted to have been done.

III.

The learned Government attorneys say, on page 13 of their brief:

> "We submit that there was *no such lack of evidence* as would constitute the judgment in this case *plainly* erroneous" (italics ours);

thus, we take it, showing their conscientious belief that the *guilt* of Dr. Freeman was *not* amply proven, as they insist was the case of the scheme charged in the indictment.

From no evidence in the record can it be fairly maintained that Dr. Freeman ever devised a scheme or artifice to defraud or did any other of the acts or things charged against him in the indictment;

and the evidence does not prove or establish that the carrying on and conduct of the business of the Dr. L. J. Jordan Company and Jordan's Museum of Anatomy was fraudulent, or that soliciting patients, advising and treating them as disclosed by the evidence, was or constituted a fraudulent scheme or artifice to defraud such persons or to obtain from them money or property by false pretences and promises, as charged in the indictment in this case.

And, as we pointed out in our opening brief, pages 38 to 43, all of the Government's witnesses eliminated Dr. Freeman from any intention on their part that their testimony should be taken or understood to charge or connect Dr. Freeman with anything whatever that was improper, as to which they might have testified.

IV.

The other questions discussed by the learned attorneys for the Government have been fully considered and presented by us in our opening brief for the plaintiff in error.

In conclusion, we respectfully submit that the judgment should be reversed; and in the event that the Court should not reverse this judgment, then we respectfully appeal to the Court to modify

the judgment, so that the sentence of imprisonment may be remitted.

Dated, San Francisco,
June 1, 1917.

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